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# Renewed Compassion for the Dying in Compassion in Dying v. State of Washington

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## NOTE

### RENEWED COMPASSION FOR THE DYING IN *COMPASSION IN DYING* v. *STATE* OF WASHINGTON

*[Compassion] is the supreme elixir  
That overcomes the sovereignty of death.  
It is the inexhaustible treasure  
That eliminates poverty in the world.  
It is the supreme medicine  
That quells the world's disease.  
It is the tree that shelters all beings  
Wandering and tired on the path of conditioned  
existence.  
It is the universal bridge  
That leads to freedom from unhappy states of  
birth.  
It is the dawning moon of the mind  
That dispels the torment of disturbing  
conceptions.  
It is the great sun that finally removes  
The misty ignorance of the world.<sup>1</sup>*

#### I. INTRODUCTION

In *Compassion In Dying v. State of Washington*,<sup>2</sup> three patients, five physicians, and a non-profit organization called Compassion in Dying challenged the constitutionality of a

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1. SOGYAL RINPOCHE, THE TIBETAN BOOK OF LIVING AND DYING 201 (1992) (quoting SHANTIDEVA, A GUIDE TO THE BODHISATTVA'S WAY OF LIFE (BODHICARYAVATARA) 34 (Stephen Batchelor trans., 1979)). This passage praises the joys of compassion. *Id.*

2. No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (opinion by Reinhardt, J.), *rev'd* 49 F.3d 586 (9th Cir. 1995).

Washington State statute which bans all assisted suicide, including physician-assisted death requested by terminally ill, mentally competent adults.<sup>3</sup> The district court held the statute unconstitutional for violating the patient-plaintiffs' Fourteenth Amendment liberty interests and equal protection rights.<sup>4</sup> A three-judge panel of the Ninth Circuit held that no constitutional right to die exists under either the Due Process or Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.<sup>5</sup> The Ninth Circuit granted review *en banc*.<sup>6</sup> The *en banc* court issued a decision reversing the three-judge panel and affirming the district court's decision.<sup>7</sup> The *en banc* court held "a constitutionally-protected liberty interest in determining the time and manner of one's own death" exists within the Due Process Clause of the Fourteenth Amendment.<sup>8</sup> The *en banc* court weighed this liberty interest against Washington's legitimate and countervailing state interests, and determined that the Washington statute is unconstitutional as it prohibits physicians from prescribing life-ending medication to terminally ill, mentally competent adults who choose to hasten their deaths.<sup>9</sup>

## II. FACTS AND PROCEDURAL HISTORY

### A. THE PLAINTIFFS

The plaintiffs consisted of a non-profit organization called Compassion in Dying, five physicians, and three terminally ill patients.<sup>10</sup> Jane Roe was 69 years old and had been diagnosed

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3. *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994). The statute at issue in this case states:

Promoting a suicide attempt. (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide is a Class C felony.

WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

4. *Compassion in Dying*, 850 F. Supp. at 1467.

5. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 590 (9th Cir. 1995) (opinion by Noonan, J., joined by O'Scannlain; dissent by Wright, J.).

6. *Compassion in Dying v. State of Washington*, 62 F.3d 299 (9th Cir. 1995).

7. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996), *rev'g* 49 F.3d 586 (9th Cir. 1995).

8. *Id.* at \*1.

9. *Id.*

10. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 588-89 (9th Cir.

with cancer in 1988.<sup>11</sup> Since June 1993, Ms. Roe had been bedridden.<sup>12</sup> By November 1993, her life expectancy was less than six months.<sup>13</sup> At this point her doctor recommended she enter a hospice for care and comfort.<sup>14</sup> Despite her physical

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1995). The appeal to the Ninth Circuit addressed only the claims by the three individual patients, and not by the physicians or the non-profit organization. *Id.* at 590.

Compassion in Dying is a non-profit organization specifically formed to assist terminally ill, mentally competent adults who wish to hasten their deaths. *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1458 (W.D. Wash. 1994). It provides patients and their families free information, counseling, emotional support, and other means of assistance. *Id.* To ensure the correct decision by the patient, Compassion in Dying has very strict eligibility requirements for receiving assistance to die. *Id.* These requirements include: (1) The primary care physician must judge that the patient is, indeed, terminally ill; (2) The patient must be capable of understanding his or her own decisions; (3) A mental health evaluation must be performed to prevent decisions motivated by depression, emotional distress, or other mental illness; (4) The request to die must not be the result of inadequate care, lack of health insurance, or other economic factors; (5) The patient personally must request to die. Compassion in Dying will not accept requests from family members or other people; however, the organization requires the approval of immediate family and close friends; (6) The patient must have requested assistance at least three times, with at least 48 hours between the second and the third requests; and (7) The patient's decision to hasten death must not be ambivalent or uncertain. *Id.* In addition, the organization requires its own physicians to review the patient's medical records and verify the patient's prognosis and decision-making capabilities. *Id.*

The five physician-plaintiffs regularly treated terminally ill patients. *Id.* They each claim to have received requests from these patients for assistance in hastening death. *Id.* The physician-plaintiffs claim that sometimes their professional judgment required them to provide this help. *Id.* However, they each specifically declared that the Washington statute had deterred them from doing so. *Id.*

11. *Id.* at 1456. The patient-plaintiffs used pseudonyms to protect their privacy. *Compassion in Dying*, 49 F.3d at 588. By the time this suit was filed, Ms. Roe's cancer had spread throughout her entire body and she was in the last stage of the disease before death. *Compassion in Dying*, 850 F. Supp. at 1456. She had already undergone chemotherapy, radiation, and various other cancer treatments. *Id.* This produced little or no relief from the disease and the accompanying pain. *Id.*

12. *Id.* In addition to pain, Ms. Roe also suffered from swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness. *Id.*

13. *Id.*

14. *Id.* A hospice is a formal program of comfort care for persons in the last six months of life which provides pain management, symptom control, and family support. DEREK HUMPHRY, *LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING* 15 (1993). Comfort care measures do not attempt to treat the illness, but specifically attempt to relieve pain and discomfort in the last stages of a disease. *Id.* Comfort care is generally used either when a patient's traditional medical treatment is no longer effective, or when the burdens of a patient's illness outweigh the benefits of continued traditional medical treatment. TIMOTHY E. QUILL,

ailments and discomfort, Ms. Roe was mentally competent.<sup>15</sup> She requested help from Compassion in Dying to hasten her death using prescription drugs.<sup>16</sup> Because of the Washington State statute, Compassion in Dying was unable to lawfully provide prescription drugs to help Ms. Roe die.<sup>17</sup> Ms. Roe eventually died prior to the district court's judgment in her case challenging the statute.<sup>18</sup>

John Doe, age 44, was dying of AIDS.<sup>19</sup> At the time the complaint was filed in district court, he was in the terminal stage of his illness.<sup>20</sup> He was mentally competent and wanted to hasten his death with doctor-prescribed drugs to prevent further and unnecessary pain.<sup>21</sup> Because of the Washington State statute, Compassion in Dying could not lawfully provide Mr. Doe with this relief.<sup>22</sup> Mr. Doe died of natural causes before the district court entered judgment.<sup>23</sup>

James Poe was 69 years old and suffered from terminal chronic emphysema and heart disease.<sup>24</sup> Mr. Poe required the assistance of an oxygen tank to breathe.<sup>25</sup> At the time this

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M.D., DEATH AND DIGNITY: MAKING CHOICES AND TAKING CHARGE 76 (1993). Some physicians oppose hospice care because an unintended shortening of the patient's life is a side effect of this program. *Id.* at 78. However, one advantage of comfort care is to humanize the process of dying by focusing on improving the *quality* of life, rather than the length of life. *Id.* In addition, comfort care procedures emphasize the person, rather than the disease. *Id.* at 79.

15. *Compassion in Dying*, 850 F. Supp. at 1456.

16. *Id.* Ms. Roe complied with all Compassion in Dying's requirements. *Id.* See *supra* note 10 for a list of the requirements.

17. See generally *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994); WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

18. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 588 (9th Cir. 1995).

19. *Compassion in Dying*, 850 F. Supp. at 1456. Mr. Doe had been diagnosed in 1991 and had since suffered from pneumonia twice, chronic and severe skin and sinus infections, grand mal seizures, extreme fatigue, and cytomegalovirus retinitis resulting in blindness. *Id.*

20. *Id.*

21. *Id.* at 1456-57. Mr. Doe had previously witnessed the long, suffering deaths of both his companion from AIDS and his grandfather from diabetes. *Id.* at 1456. He wished to avoid such suffering himself. See *id.*

22. See generally *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994); WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

23. *Compassion in Dying*, 49 F.3d at 588.

24. *Compassion in Dying*, 850 F. Supp. at 1457.

25. *Id.* Mr. Poe also had a constant sensation of suffocating and experienced

suit was filed, he was in the terminal stage of incurable pulmonary and cardiac diseases.<sup>26</sup> Mr. Poe was mentally competent and wanted to hasten his death through physician-prescribed drugs.<sup>27</sup> Due to the Washington State statute, Compassion in Dying was not lawfully allowed to provide this.<sup>28</sup> Mr. Poe lived to hear of the district court's judgment, but died of natural causes prior to the appeal before the three-judge panel of the Ninth Circuit.<sup>29</sup>

## B. PROCEDURAL HISTORY

Plaintiffs challenged the constitutionality of the Washington State statute as it applied to terminally ill, mentally competent adults who specifically request a physician's assistance to hasten death.<sup>30</sup> They sought declaratory judgment to render the statute unconstitutional for violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>31</sup>

All plaintiffs moved for summary judgment.<sup>32</sup> The district court denied the summary judgment motions for the physicians and for Compassion in Dying.<sup>33</sup> However, the district court granted summary judgment for the patients, holding that the statute violated terminally ill, mentally competent adults'

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many panic attacks due to his inability to breathe. *Id.* In addition, his heart failure caused blockage of the blood flow to his extremities, resulting in severe leg pain. *Id.*

26. *Id.*

27. *Id.*

28. See *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994); WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

29. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 588 (9th Cir. 1995).

30. See WASH. REV. CODE ANN. § 9A.36.060 (West 1988); *Compassion in Dying*, 850 F. Supp. at 1455-56; *Compassion in Dying*, 49 F.3d at 589; *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*1 (9th Cir. Mar. 6, 1996).

31. *Compassion in Dying*, 850 F. Supp. at 1459; U.S. CONST. amend. XIV, § 1.

32. *Compassion in Dying*, 49 F.3d at 589.

33. *Compassion in Dying*, 850 F. Supp. at 1467. The district court did not address the claims brought by Compassion in Dying and the physician-plaintiffs because these claims were not discussed in the briefs for the summary judgment motions. *Id.* Therefore, the court denied their motions. *Id.* This issue was not on appeal before the Ninth Circuit. See *Compassion in Dying*, 49 F.3d at 589.

Fourteenth Amendment liberty interest to choose physician-hastened death.<sup>34</sup> In addition, the district court held that the statute violated the patient-plaintiffs' right to equal protection under the Fourteenth Amendment because it prohibits physician-hastened death but permits withdrawal of life-sustaining treatment from substantially similarly situated patients.<sup>35</sup>

Relying on two landmark Supreme Court cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>36</sup> and *Cruzan v. Director, Missouri Dep't of Health*,<sup>37</sup> the district court held that the patient-plaintiffs had a fundamental liberty interest in "the freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity."<sup>38</sup> The district court also held that the undue burden standard cited in *Casey* was the appropriate test to use in weighing this fundamental right against the state's interests.<sup>39</sup> After examining the state's interests and whether there was a substantial obstacle to the patient-plaintiffs, the district court concluded that the statute placed an undue burden on their rights.<sup>40</sup> In addition, the district court ruled that the statute violated the patient-plaintiffs' rights to equal protection, as contrasted with the

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34. *Compassion in Dying*, 850 F. Supp. at 1467.

35. *Id.*

36. 112 S. Ct. 2791 (1992).

37. 497 U.S. 261 (1990).

38. *Compassion in Dying*, 850 F. Supp. at 1461.

39. *Id.* at 1462-63. The majority in *Casey* held that the correct test for a facial constitutional challenge to abortion regulations was whether the "state regulation imposes an undue burden on a woman's ability to [choose whether to have an abortion]". *Casey*, 112 S. Ct. at 2819. Specifically, *Casey* held that "a finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820 (emphasis added). The district court used the undue burden standard set out in *Casey* because a majority of the *Casey* Court agreed that this standard is the "standard of general application to which we intend to adhere". *Compassion in Dying*, 850 F. Supp. at 1463 (quoting *Casey*, 112 S. Ct. at 2820). The *Casey* Court held that the undue burden standard is "the appropriate means of reconciling the State's interest with the . . . right 'to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person.'" *Casey*, 112 S. Ct. at 2819-20 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). The district court found that *Compassion in Dying* concerns the same liberty interest, thereby holding that the undue burden standard is to be used here as well as in the abortion cases. *Compassion in Dying*, 850 F. Supp. at 1463-64.

40. *Id.* at 1465.

right of terminally ill patients in Washington to request withdrawal of life-sustaining equipment.<sup>41</sup> The statute at issue prevents patients in substantially the same situation from using other means to hasten their deaths.<sup>42</sup>

The State of Washington appealed the district court's grant of summary judgment for the patient-plaintiffs to the Ninth Circuit.<sup>43</sup> A Ninth Circuit three-judge panel considered the appeal, and reversed the district court's decision.<sup>44</sup> The Ninth Circuit then granted *en banc* review.<sup>45</sup> Shortly before publication of this note, the *en banc* court issued its opinion reversing the three-judge panel and affirming the district court's holding.<sup>46</sup> With this decision, the Ninth Circuit recognized a constitutional liberty interest in determining the time and manner of one's own death.<sup>47</sup>

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41. *Id.* at 1467. Washington State permits the withdrawal of life-sustaining treatment from terminally ill patients, even if this withdrawal results in death. WASH. REV. CODE ANN. § 70.122.030(1) (West Supp. 1995). In addition, Washington State does not hold the physician culpable for these deaths. WASH. REV. CODE ANN. § 70.122.051 (West Supp. 1995).

Section 70.122.030(1), states in part:

Any adult person may execute a directive directing the withholding or withdrawal of life-sustaining treatment in a terminal condition or permanent unconscious condition.

*Id.*

Section 70.122.051, provides that:

Any physician, health care provider acting under the direction of a physician, or health facility and its personnel who participate in good faith in the withholding or withdrawal of life-sustaining treatment from a qualified patient in accordance with the requirements of this chapter, shall be immune from legal liability, including civil, criminal, or professional conduct sanctions, unless otherwise negligent.

*Id.*

42. *Compassion in Dying*, 850 F. Supp. at 1467.

43. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 588 (9th Cir. 1995).

44. *See Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995).

45. *Compassion in Dying v. State of Washington*, 62 F.3d 299 (9th Cir. 1995).

46. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996).

47. *Id.* at \*1. This note discusses the reversal of the three-judge panel decision by the *en banc* court.



## III. BACKGROUND

## A. BASIS OF THE CONTROVERSY

Euthanasia was an accepted practice in ancient Greece and Rome.<sup>48</sup> The term "euthanasia" derived from the Greek language.<sup>49</sup> Ancient medical ethics required physicians to alleviate the patient's suffering, to lessen the violence of disease, and to refuse to treat those who were overwhelmed by their diseases.<sup>50</sup> The physicians knew that medicine was often powerless.<sup>51</sup> Therefore, they had a duty to treat only those patients they could help, and not those patients they could not help.<sup>52</sup>

Controversy over euthanasia dates back at least as far as the beginnings of Christianity.<sup>53</sup> In the second and third cen-

48. Wendy N. Weigand, *Has the Time Come for Doctor Death: Should Physician-Assisted Suicide be Legalized?*, 7 J.L. & HEALTH 321, n.3 (1992-1993) (citing Abigail Trafford, *Society's View of Suicide*, THE WASHINGTON POST, August 20, 1991, at Z11). Euthanasia is a deliberate life-shortening act administered on an incurable patient in such a patient's interest, intending to create a quick, peaceful death. DEREK HUMPHRY & ANN WICKETT, *THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA* 303 (1986).

Seneca, the famed Roman Stoic philosopher, hastened his death because he was simply ready to die. Weigand, *supra*, at 321, n.3 (citing Trafford, *supra*, at Z11).

It makes a great deal of difference whether a man is lengthening his life or his death. But if the body is useless for service, why should one not free the struggling soul? Perhaps one ought to do this a little before the debt is due, lest, when it falls due, he may be unable to perform the act.

*Id.* at 325 (quoting JERRY B. WILSON, *DEATH BY DECISION: THE MEDICAL, MORAL, AND LEGAL DILEMMAS OF EUTHANASIA* 22 (1975) (citing SENECA, *EPISTULAE MORALES*, Vol I, lvii 32-36, at 407-9)).

49. Weigand, *supra* note 48, at 322. "Eu" translates as "well" or "good"; "thanos" translates as "death." *Id.*

50. *Id.* at 324.

51. *Id.*

52. *Id.* (citing WILSON, *supra* note 48, at 19). "It is safe to say that a physician who prolonged the life of a person who could not ultimately recover his or her health was considered to be acting unethically." Weigand, *supra* note 48, at 325 (quoting Darrell W. Amundsen, *History of Medical Ethics: Ancient Greece and Rome*, 3 *ENCYCLOPEDIA OF BIOETHICS* 930, 934 (1978) (citing PLATO, *REPUBLIC* 406A; DEMOSTHENES, *THIRD OLYNTHIAC* 33; PLUTARCH, *MORALIA*, 23(A))).

53. See HUMPHRY & WICKETT, *supra* note 48, at 5-7.

turies, Christians viewed all forms of euthanasia as suicide.<sup>54</sup> The Catholic Church advanced the belief that suicide was a mortal sin, equivalent to murder.<sup>55</sup> Suicide was considered to violate the strict interpretation of the Sixth Commandment of the Bible as it left no time for the "sinner" to repent.<sup>56</sup> Historically, Christians believed that God alone may determine when a person shall die.<sup>57</sup> This Christian view influenced church law, as well as secular law.<sup>58</sup>

In 1957, Pope Pius XII announced that a member of the Catholic Church need only accept ordinary medical treatments, and not extraordinary medical treatments to uphold the faith.<sup>59</sup> Therefore, if a person survives only with the help of extraordinary means, Catholic policy allows these means to be removed, even if it results in death.<sup>60</sup> In addition, the Pope allowed one to receive large doses of drugs to relieve unbearable pain for patients with incurable cancer, even if the drugs shortened that patient's life.<sup>61</sup> However, this practice was ac-

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54. *Id.* at 6.

55. Mark D. Frederick, *Physician-Assisted Suicide: A Personal Right?*, 21 S.U. L. REV. 59, 63 (1994) (citing A HANDBOOK FOR THE STUDY OF SUICIDE 4-26 (S. Perlin ed., 1975)).

56. HUMPHRY & WICKETT, *supra* note 48, at 7. The Sixth Commandment states, "Thou shalt not kill." *Exodus* 20:13. The Bible does not specifically prohibit or condemn suicide; it merely describes suicide in general terms. Frederick, *supra* note 55, at 63.

57. HUMPHRY & WICKETT, *supra* note 48, at 6. The prescribed Catholic stance on euthanasia is: "Only God has the right to take away the life of the innocent, and human suffering has a special value." *Id.* at 51 (quoting Gerald Kelly, *Medico-Moral Problems*, HOSPITAL PROGRESS, March 1950, Vol. 31, No. 3, at 91).

58. HUMPHRY & WICKETT, *supra* note 48, at 5-6. Early church law dictated that if one committed "self-murder" then that person would not be given a Christian burial. *Id.* at 6. Civil penalties included confiscating the person's goods and property to the detriment of the survivors and an ignominious burial on the highway, impaled by a stake. *Id.*

59. *Id.* at 195-96. Gerald Kelly, of the Society for Jesuit, defined ordinary means as all medicines, treatments, and operations "which offer a reasonable hope of benefit for the patient and which can be obtained and used without excessive expense, pain, or other inconvenience." *Id.* at 196 (quoting GERALD KELLY, *MEDICO-MORAL PROBLEMS* 129 (1958)). Extraordinary means are those which "cannot be obtained or used without excessive expense, pain, or other inconvenience, or which, if used would not offer reasonable hope of benefit." *Id.* (quoting KELLY, *supra*, at 129).

60. See HUMPHRY & WICKETT, *supra* note 48, at 196.

61. *Id.* at 52. This so-called "double-effect" is the unintended shortening of a patient's life as a potential side effect for pain relief treatment. QUILL, *supra* note 14, at 78.

ceptable to the Catholic religion only if no direct causal link between the death and the will of the interested parties existed.<sup>62</sup> In other words, the Pope accepted passive euthanasia in limited circumstances, but continued to denounce active euthanasia.<sup>63</sup>

The traditional Judeo-Christian belief in the sanctity of life is based on beliefs in God and that life has a purpose.<sup>64</sup> The Judeo-Christian influence on law and ethics has survived throughout the years.<sup>65</sup> Laws against assisted death are rooted in religious origins.<sup>66</sup> However, neither such laws nor the

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62. HUMPHRY & WICKETT, *supra* note 48, at 52. As long as the primary purpose of the treatment was to relieve suffering, the double effect of pain relief and death absolved the physician from responsibility for indirectly contributing to the patient's death. QUILL, *supra* note 14, at 78. This also absolved the Catholic doctor or patient from committing a "sin". See HUMPHRY & WICKETT, *supra* note 48, at 52.

63. *Id.* at 288. "Passive suicide" or "passive euthanasia" has been defined as the deliberate disconnection of life support equipment, or cessation of any medical procedure, permitting the death of a patient. HUMPHRY, *supra* note 14, at 12. "Active euthanasia" has been defined as the action of one person directly helping another to die on request, such as injecting the patient with medication intended to hasten death. *Id.* "Assisted suicide" has been defined as providing the means by which a person can take his or her own life, such as a doctor giving the patient a prescription for medication intended to hasten death. *Id.* "Self-deliverance" has been defined as an irreversibly ill person making a rational decision to end his or her own life. *Id.*

In addition to Catholicism, most other Christian religions currently do not oppose passive euthanasia because simply removing extraordinary medical means may be viewed as a natural death and, therefore, part of God's will. HUMPHRY & WICKETT, *supra* note 48, at 288. Judaism also allows passive, or "indirect," euthanasia as long as the patient's death is merely the unpremeditated result of some medication given to relieve pain or is a consequence of withdrawal of medical treatment. *Id.* at 289 (citing RABBI IMMANUEL JAKOBOWITS, *JEWISH MEDICAL ETHICS: A COMPARATIVE AND HISTORICAL STUDY OF THE JEWISH RELIGIOUS ATTITUDES TO MEDICINE AND ITS PRACTICE* 345 (1959)).

64. See *supra* text accompanying notes 53-63.

65. See Frederick, *supra* note 55, at 63. See also HUMPHRY & WICKETT, *supra* note 48, at 218. Courts have generally disregarded using humane motive and the patient's terminal condition as factors in mercy killing cases, reflecting the "sanctity of life" tradition. HUMPHRY & WICKETT, *supra* note 48, at 218. "[C]onsent of the deceased is not a defense in a prosecution for homicide. The right of life and personal security is not only sacred . . . it is inalienable." *Martin v. Commonwealth*, 37 S.E.2d 43, 47 (Va. 1946) (quoting 26 AM. JUR. *Homicide* § 103). "One who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he nonetheless acts with malice if he is able to comprehend that *society prohibits his act regardless of his personal belief*." *People v. Conley*, 411 P.2d 911, 918 (Cal. 1966) (emphasis added).

66. See Frederick, *supra* note 55, at 59; Weigand, *supra* note 48, at 326;

opponents of euthanasia acknowledge that people of other religions and non-believers may have rights and beliefs as well.<sup>67</sup>

## B. MODERN HISTORY

The New Jersey Supreme Court first allowed the withdrawal of treatment from an incompetent patient in *In re Quinlan*.<sup>68</sup> The court noted that the United States Supreme Court found the constitutional right of privacy to exist in the "penumbra of the specific guarantees of the Bill of Rights."<sup>69</sup> Applying the United States Supreme Court's recognition that a personal privacy right exists and that the Constitution guarantees certain areas of privacy, the *Quinlan* court expanded the privacy right to encompass a patient's decision to decline medical treatment.<sup>70</sup>

The *Quinlan* court held that the state's interest in preserving life weakens, while the patient's right to privacy grows, "as the degree of bodily invasion increases and the prognosis dims."<sup>71</sup> The New Jersey Supreme Court held that Ms.

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HUMPHRY & WICKETT, *supra* note 48, at 5-7.

67. HUMPHRY & WICKETT, *supra* note 48, at 165.

68. 355 A.2d 647 (N.J. 1976). Ms. Quinlan had stopped breathing resulting in coma and decortication, a condition relating to derangement of the brain's cortex. *Id.* at 654. She required a respirator to breathe. *Id.* Her doctor testified that she remained in a coma from the time that she arrived at the hospital, and characterized her as being in a "chronic, persistent vegetative state" with no cognitive function. *Id.* However, the doctors did not consider this condition brain dead. *Id.*

69. *Quinlan*, 355 A.2d at 663 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

70. *Id.* at 663-64 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969)). The *Quinlan* court likened this right to that of a woman's right to choose an abortion. *Id.* at 663 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)). The Massachusetts Supreme Court has also held such a privacy interest exists:

The right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.

*Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977).

71. *Quinlan*, 355 A.2d at 664.

Quinlan's interest in being free of bodily invasion outweighed the state's interest in preserving her life.<sup>72</sup>

The *Quinlan* decision has had a profound effect on "living will" legislation in many states other than New Jersey, as well as on public opinion.<sup>73</sup> In addition, this case affected case law in other jurisdictions, such as Massachusetts, where the Supreme Court held that a terminally ill, incompetent patient has a right to have invasive medical treatment withdrawn, even if the withdrawal of treatment will result in death.<sup>74</sup> Further, Washington State has extended this concept to allow withdrawal of artificial means of nutrition and hydration.<sup>75</sup>

72. *Id.* The Massachusetts Supreme Court has since held a state's interests against euthanasia are: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession. *Saikewicz*, 370 N.E.2d at 426.

73. HUMPHRY & WICKETT, *supra* note 48, at 108-14. A living will is an advance directive that provides specific instructions about health care treatment. QUILL, *supra* note 14, at 224. In particular, it reflects the patient's wishes to refuse, or to retain, life-sustaining treatment if the patient becomes incompetent in the future. *Id.* The will is "living" in the sense that it is activated when a person loses mental capacity but remains alive. *Id.* at 190.

In 1977, one year after the *Quinlan* decision, fifty living will bills were introduced in thirty-eight state legislatures. HUMPHRY & WICKETT, *supra* note 48, at 108. Eight states signed them into law. *Id.* This is compared to only five states introducing such bills before 1975. *Id.* In addition, just prior to the *Quinlan* decision, only seventeen bills were introduced and none were signed into law. *Id.* Furthermore, before 1975, the Euthanasia Education Council satisfied 750,000 requests for its sample version of a living will, as compared to 1.25 million requests in the year and a half after *Quinlan*. *Id.* at 114.

74. Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977). The facts of *Saikewicz* differ from *Quinlan* in two respects: (1) *Saikewicz* concerned a terminally ill patient as opposed to one in a persistent vegetative state, and (2) the patient in *Saikewicz* was severely mentally retarded (therefore, he was never competent) as opposed to one who had become incompetent. *Id.* at 420-21. Despite these differences, the court still held that a constitutional right to privacy exists which encompasses "an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." *Id.* at 426. In addition, the court indicated that, like in *Quinlan*, as the patient's prognosis decreases, the state's interest in preserving that life weakens. *Id.* at 425-26.

75. *In re Guardianship of Grant*, 747 P.2d 445, 454 (Wash. 1987). "The right to have life-sustaining treatment withheld extends to all artificial procedures which serve only to prolong the life of a terminally ill patient." *Id.* The court deferred to the legislature to address assisted suicide. *Id.* at 455. The resulting statute, WASH. REV. CODE ANN. § 9A.36.060 (West 1988), is at issue in *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996).

The Washington Supreme Court held that Washington State's interests against euthanasia are: (1) the preservation of life; (2) the protection of interests

The United States Supreme Court, in *Cruzan v. Director, Missouri Dep't of Health*, found that a constitutionally protected liberty interest in refusing unwanted medical treatment exists.<sup>76</sup> The Court stated that one has the right to refuse artificial life-saving nutrition and hydration.<sup>77</sup> Therefore, the right to refuse medical treatment exists even if exercising that right results in death.<sup>78</sup> However, the Court specifically left open the question of whether the Constitution also permits physician-assisted death, thereby not foreclosing the existence of this right.<sup>79</sup> In addition, the Court acknowledged that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality."<sup>80</sup>

Public perception of euthanasia has changed over time. A 1991 opinion poll sponsored by the Boston Globe and Harvard School of Public Health showed that 64% of Americans favor access to physician-assisted death for terminally ill patients.<sup>81</sup> In 1988, the San Francisco Medical Society surveyed its physician-members and found that 70% of the 676 respondents

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of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession. *Grant*, 747 P.2d at 451 (citing *In re Colyer*, 660 P.2d 738 (Wash. 1983)). In addition, the court held that "the amount of pain endured by a dying patient is a significant factor to be considered [when deciding whether the right to withhold life-sustaining treatment can attach]. . . . The individual's right to die with dignity must not be ignored." *Id.* at 450-51.

76. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Washington State permits terminally ill patients to refuse medical treatment even if this refusal will result in death. WASH. REV. CODE ANN. § 70.122.030(1) (West Supp. 1995). In addition, any physician who refrains from treating a patient, according to that patient's wishes, will not be prosecuted even in the event of that patient's death. WASH. REV. CODE ANN. § 70.122.051 (West Supp. 1995).

77. *Cruzan*, 497 U.S. at 279.

78. *See id.* *See also* Victoria L. Helms, *Assisted Suicide: Giving Meaning to the Right to Die*, 6 ST. THOMAS L. REV. 173 (1993).

79. *Cruzan*, 497 U.S. at 277-78. "[I]n deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'" *Id.* (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)). Therefore, the Court has not denied that an individual's right to privacy may include physician-assisted death. Frederick, *supra* note 55, at 88.

80. *Cruzan*, 497 U.S. at 281. The United States Supreme Court has since held that deeply personal choices are within the Fourteenth Amendment's liberty interest. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2807 (1992). One such choice is the choice between life and death, as acknowledged by the *Cruzan* Court. *Cruzan*, 497 U.S. at 281.

81. Weigand, *supra* note 48, at 342 (citing Richard A. Knox, *Poll: Americans Favor Mercy Killing*, THE BOSTON GLOBE, Nov. 3, 1991, at 1).

agreed that terminally ill patients should have the option of requesting active euthanasia.<sup>82</sup>

#### IV. COURT'S ANALYSIS

##### A. DUE PROCESS

In its analysis of *Compassion in Dying v. State of Washington*, the three-judge panel of the Ninth Circuit held that no constitutional right to "aid in killing oneself" exists under the United States Constitution.<sup>83</sup> The three-judge panel disagreed with the district court's use of *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>84</sup> to assert a right to die.<sup>85</sup> It

82. Steve Heilig, *The SFMS Euthanasia Survey: Results and Analyses*, SAN FRANCISCO MEDICINE, May 1988, at 24. This change in attitude may be attributed in part to the media's coverage of Dr. Jack Kevorkian, who has assisted several patients to die. See Weigand, *supra* note 48, at 331-32. However, while Dr. Kevorkian may think that his publicity will increase public favor for physician-assisted death, his methods may actually hamper euthanasia advocates' efforts to legalize this practice. See QUILL, *supra* note 14, at 153. In 1991, Washington State's Initiative 119, which would have legalized physician-assisted death for terminally ill, mentally competent patients, lost by a 54 to 46 percent margin. *Id.* at 152-53. During the week before the vote, Dr. Kevorkian assisted two more deaths, which may have enhanced Washington voters' fears about adequate safeguards and the potential for abuse. *Id.* at 153. In addition, Dr. Kevorkian's actions have precipitated Michigan's ban on physician-assisted death. Weigand, *supra* note 48, at 333, n.73.

Dr. Kevorkian has been admired by many for his principles regarding physician-assisted death. DEREK HUMPHRY, *DYING WITH DIGNITY: UNDERSTANDING EUTHANASIA* 40 (1992). However, his well-publicized actions, his brief acquaintance with his patients before they die, and his disregard for the law have all earned him severe criticism. HUMPHRY, *supra* note 14, at 23. Some specific criticisms of Dr. Kevorkian include: (1) that he does not have the knowledge or experience to ensure that all alternative medical approaches have been exhausted, or that the patient's wish to die is not based upon depression; (2) that he has not developed a deep or long-standing relationship with the patient; (3) that he has not researched all information about the irreversibility of each patient's illness or about comfort care measures; (4) that he has assisted patients whose medical conditions have been ambiguous and uncertain; and (5) that he has used the deaths to gain publicity to promote his own ideas about death. QUILL, *supra* note 14, at 124-25.

83. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 590, 591 (9th Cir. 1995).

84. 112 S. Ct. 2791 (1992). Freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity, including a woman's choice to have an abortion, is a fundamental liberty interest. *Id.*

85. *Compassion in Dying*, 49 F.3d at 590. Specifically, the district court held

found that the district court used *Casey*'s language out of context, stating that *Casey* applies only to regulating abortion and does not create a right to commit suicide.<sup>86</sup> Therefore, the district court had made an "enormous leap" in holding that such a

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there is a "right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life." *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994) (quoting *Casey*, 112 S. Ct. at 2801).

86. *Compassion in Dying*, 49 F.3d at 590. The *Casey* language referred to is:

[M]atters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Casey*, 112 S. Ct. at 2807.

Throughout *Compassion in Dying*, the three-judge panel used the terms "killing oneself" and "suicide," rather than "assisted death" or "self-deliverance." See *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995). "Suicide" can be defined as an irrational decision to cause one's own death, due to emotional or psychological pressures. See HUMPHRY, *supra* note 14, at 12-13. Advocates of the right to assisted death claim this term is inaccurate and unfair. *Id.* at 12. "Self-deliverance" is defined as the rational decision by a terminally ill patient to end one's own life. *Id.* Patient-plaintiffs argued that the term "suicide" is an inaccurate characterization of a terminally ill patient's decision to hasten his or her death. Brief of Appellees at 6-7, n.5, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (No. 94-35534) (1995).

I find it appalling that the pejorative label "suicide" would be put on a terminally ill person's choice to hasten his or her inevitable death. In no meaningful sense of the term can a choice to hasten one's own inevitable death by the use of physician-prescribed medications be labeled a "suicide." . . . The terminally ill person, who is facing death, and who seeks to have the choice to hasten that inevitable death, is not "committing suicide" by ending a life that otherwise is of indefinite duration. The life of the terminally ill person is coming to an end, and the question is whether the terminally ill person must undergo unbearable suffering until death comes "naturally", or whether that person can make the choice to end the unbearable suffering by the use of physician-prescribed medications.

*Id.* at 7, n.5 (quoting Robert A. Sedler, *The Constitution and Hastening Inevitable Death*, HASTINGS CENTER REP., Sep.-Oct. 1993, at 20, 22). See also Leslie Bender, *A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia*, 59 TENN. L. REV. 519, 527-30 (1992). "When we call doctors' actions 'aiding suicide,' 'euthanasia,' or 'killing,' we prefigure the ensuing debate. These labels carry pejorative baggage." *Id.* at 527-28.



right exists.<sup>87</sup> However, the *en banc* opinion relied heavily on *Casey* and the abortion cases to find a due process liberty interest in determining the time and manner of one's own death.<sup>88</sup>

The three-judge panel opinion implied that the panel did not wish to extend due process rights to previously unarticulated circumstances.<sup>89</sup> The opinion explained that if the district court's assertion was correct, it would lead to absurd results.<sup>90</sup> Specifically, the three-judge panel stated that if a right to assistance in suicide truly exists, then this right would apply to every "sane" adult regardless of physical illness.<sup>91</sup> Restricting its application only to the terminally ill would be "illusory."<sup>92</sup> Therefore, the three-judge panel held that the proposed constitutional right cannot be restricted at all.<sup>93</sup> The *en banc* court, however, clearly limited its holding to terminally ill,

87. *Compassion in Dying*, 49 F.3d at 590.

88. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*7-8, 18-19 (9th Cir. Mar. 6, 1996). The *en banc* court examined the compelling similarities between right-to-die cases and abortion cases. *Id.* at \*7. First, "In the former as in the latter, the relative strength of the competing interests changes as physical, medical, or related circumstances vary." *Id.* Second, "Equally important, both types of cases raises issues of life and death, and both arouse similar religious and moral concerns. Both present basic questions about an individual's right of choice." *Id.*

The *en banc* court stated that the fundamental message of *Casey* regarding the issue in the present case is: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to person dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at \*8 (quoting *Casey*, 112 S. Ct. at 2807). The *en banc* court stated that a patient's decision whether to endure or avoid unrelieved misery and torture "constitutes one of the most, if not the most, 'intimate and personal choices a person may make in a lifetime,' a choice that is 'central to personal dignity and autonomy.' Surely such a decision implicates a most vital liberty interest." *Id.* at \*19 (quoting *Casey*, 112 S. Ct. at 2807).

89. *Compassion in Dying*, 49 F.3d at 591. The three-judge panel stated that since no court had ever specifically held that a constitutional right to "aid in killing oneself" exists, it would not and should not "invent a constitutional right unknown to the past and antithetical to the defense of human life that has been a chief responsibility of our constitutional government." *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The three-judge panel did not provide legal authority or analysis for holding that constitutional rights cannot be narrowly tailored to a certain group to which that right applies. *See id.*

93. *Id.* at 590.

mentally competent adults who wish to hasten their own deaths.<sup>94</sup>

Next, the three-judge panel explained that the Supreme Court's holding in *Cruzan v. Director, Missouri Dep't of Health*<sup>95</sup> does not extend to a terminally ill patient's right to gain assistance in suicide.<sup>96</sup> Therefore, the three-judge panel denied that a right to choose to die exists because the district court lacked a basis in precedent to assert this right.<sup>97</sup> In contrast, the *en banc* court found that *Cruzan*, by acknowledging a liberty interest in refusing life-sustaining nutrition and hydration, even when this refusal results in death, necessarily recognizes a liberty interest in hastening one's own death.<sup>98</sup>

Further, the three-judge panel held that a right-to-die lacks foundation in American tradition and history because no court has ever upheld a right to aid in killing oneself.<sup>99</sup> Again,

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94. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*5, n.9 (9th Cir. Mar. 6, 1996). "Declaring a statute unconstitutional as applied to members of a group is atypical but not uncommon." *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972)).

95. 497 U.S. 261 (1990).

96. *Compassion in Dying*, 49 F.3d at 591. *Cruzan* held that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition", even at risk of death. *Cruzan*, 497 U.S. at 279. The three-judge panel in *Compassion in Dying* reasoned that *Cruzan* applied only to a patient's limited right to refuse medical treatment and that this right is not synonymous with a right to actively kill oneself. *Compassion in Dying*, 49 F.3d at 591. The three-judge panel stated this difference was due to the fact that the majority of states have imposed criminal liability on those who assist another to commit suicide. *Id.* However, it did not acknowledge that the very issue in this case is whether those criminal sanctions in the context at issue are constitutional. *See id.*

97. *Id.*

98. *Compassion in Dying*, 1996 WL 94848, at \*20.

99. *Compassion in Dying*, 49 F.3d at 591. Patient-plaintiffs argued that there is a right to choose to die, which includes a right to assistance in effecting that choice. Brief of Appellees, at 14, n.12, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (No. 94-35534) (1995). This is similar to a woman having the right to assistance in having an abortion, rather than forcing the woman to perform her abortion herself. *See Roe v. Wade*, 410 U.S. 113 (1973). They contend, therefore, that a physician's assistance is necessary to the exercise of a terminally ill patient's right to choose to hasten death. Brief of Appellees, at 14, n.12, *Compassion in Dying* (No. 94-35534).

The alternatives are violent suicide — horrific and almost unimaginable for a nondisturbed person — or an unassist-

the *en banc* court disagreed, considering American tradition and history more broadly to find that "the relevant historical record is far more checkered than the majority [of the three-judge panel] would have us believe."<sup>100</sup> The *en banc* court also stated that the three-judge panel erred by concluding that a historical analysis alone is a sufficient basis to reject the plaintiffs' claim to a liberty interest.<sup>101</sup>

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ed attempt with poison or drugs that have not been prescribed specifically for this purpose. The undisputed record shows that terminally ill persons who seek to hasten death need medical counseling regarding the type of drugs and the amount and manner in which they should be taken, as well as a prescription, which only a doctor can provide. Attempts to hasten death without such advice frequently fail, often leaving the patient in worse shape than before or succeed only after terrible pain and suffering. The emotional and psychological effect on terminally ill persons of their inability to obtain assistance from their physicians can be devastating; patients feel abandoned by their physicians when most in need of help.

*Id.* (citations omitted). See generally QUILL, *supra* note 14.

Washington law already allows terminally ill patients to end their lives without any assistance by allowing the patient to choose to cease medical treatment. WASH. REV. CODE ANN. § 70.122.030(1) (West Supp. 1995). In addition, suicide and attempted suicide, even for mentally unstable individuals, are not crimes in Washington. *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1464, n.9 (W.D. Wash. 1994). Washington also absolves doctors and health care workers from civil, criminal, and professional conduct liability when assisting a terminally ill person to withdraw treatment. WASH. REV. CODE ANN. § 70.122.051 (West Supp. 1995). Therefore, Washington already recognizes the need for physician assistance in carrying out the patient's right to hasten death. See *id.*

100. *Compassion in Dying*, 1996 WL 94848, at \*13.

101. *Id.* at \*12. The *en banc* court cited *Loving v. Virginia* as an example of the Supreme Court finding a substantive due process right to exist, despite the fact that anti-miscegenation laws were commonplace in our nation's history. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). . . . Similar examples may be found in *Turner v. Safley*, 482 U.S. 78, 94-99 (1987) . . . ; in *Carey v. Population Service International*, 431 U.S. 678, 684 (1977) . . . ; in *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965).

*Casey*, 112 S. Ct. at 2805 (parallel citations omitted).

Rather than analyzing the district court's usage of the undue burden standard of review, the three-judge panel applied the rigid standard used in *United States v. Salerno*.<sup>102</sup> *Salerno* states that to facially challenge a statute based on constitutionality, the challengers "must establish that no set of circumstances exists under which the [statute] would be valid."<sup>103</sup> Using the *Salerno* test, the three-judge panel pointed out that the statute is constitutional in some circumstances, such as the prevention of teenage suicides or fraud upon the elderly.<sup>104</sup> Therefore, the three-judge panel held that the statute is not facially unconstitutional under the *Salerno* standard.<sup>105</sup>

The *en banc* court did not rely on the undue burden standard nor the strict *Salerno* standard.<sup>106</sup> Instead, the *en banc* court found that in substantive due process cases, a balancing test is the appropriate analysis.<sup>107</sup> The *en banc* court declined to adopt either the two-tier or three-tier tests, depending on the classification of the right.<sup>108</sup> Rather, the *en banc* court adopted a continuum approach, wherein the more important the individual right or interest, the more persuasive the justification for governmental infringement would need to be.<sup>109</sup> Although the *en banc* court declined to definitively classify the right at issue as fundamental or merely important, it made

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102. 481 U.S. 739, 745 (1987); *Compassion in Dying*, 49 F.3d at 591. See *supra* note 39 for an explanation of the undue burden standard used in *Casey*.

103. *Compassion in Dying*, 49 F.3d at 591 (quoting *Salerno*, 481 U.S. at 745).

104. *Id.*

105. *Id.*

106. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*5, n.9 (9th Cir. Mar. 6, 1996).

107. *Id.* at \*5. "Whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Id.* (quoting *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982))). See also *Mills v. Rogers*, 457 U.S. 291, 299 (1982). The *Cruzan* Court also noted that the balancing test is deeply rooted in this nation's legal traditions, noting that it has been used in substantive due process cases at least since 1905. *Cruzan*, 497 U.S. at 278 (citing *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905)). In 1905, the Supreme Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the state's interest in preventing disease. *Jacobsen*, 197 U.S. 11.

108. *Compassion in Dying*, 1996 WL 94848, at \*11.

109. *Id.*

"one point . . . absolutely clear: there can be no legitimate argument that rational basis review is applicable."<sup>110</sup>

Weighing Washington's interests against the individual's decision to die, the three-judge panel decided the state has certain interests which outweigh an individual's choice to die.<sup>111</sup> The three-judge panel acknowledged the interests as:

1. Preserving the integrity of the physician's professional ethics as perceived by the physician and by not having physicians in the role of "killers of their patients."<sup>112</sup>

The three-judge panel suggested that physicians might begin to think that killing patients is an acceptable alternative to curing or treating the patient, especially if there is no known cure for the patient's disorder.<sup>113</sup>

2. Protecting the elderly or infirm from psychological pressure to consent to their own

110. *Id.*

111. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 591-93 (9th Cir. 1995). The three-judge panel listed these interests based on two task force reports, cited by appellants and amici in their appellate briefs to the Ninth Circuit. *Id.* at 591-92. These reports are New York State Task Force, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context*, 1994 and Michigan Commission on Death and Dying, *Final Report*, 1994. *Id.*

Governor Cuomo commissioned the New York task force in 1985. *Id.* at 592. Twenty-four members represented ethical, religious, legal, and medical views. *Id.* "Respect for individual choice and self-determination has served as a touchstone for public policies about medical decisions over the past two decades." Brief of Appellees at 27, n.29, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (No. 94-35534) (1995) (quoting NEW YORK STATE TASK FORCE, *WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT* 1 (1994)). Because of this policy, a number of the task force members believed that for terminally ill, mentally competent individuals, assistance in dying would be proper and ethical. *Id.* at 15, n.13 (citing NEW YORK STATE TASK FORCE, *supra*, at 120, 140). However, these members still voted against recommending legislative reform for fear that ineligible individuals would improperly choose this option. *Id.* (citing NEW YORK STATE TASK FORCE, *supra*, at 120, 140).

The Michigan commission started in 1992. *Compassion in Dying*, 49 F.3d at 592. It agreed by majority vote to recommend legislative change in the Michigan law against assisted death. *Id.* However, the commission did not challenge the constitutionality of the existing Michigan legislation. *Id.* Neither of the task force reports were provided to the district court. *Id.*

112. *Id.*

113. *Id.*

deaths.<sup>114</sup>

The three-judge panel anticipated that physicians might seek out the best candidates for suicide and that some patients would feel compelled to agree to their doctor's recommendation.<sup>115</sup>

### 3. Preventing exploitation of minorities and the poor.<sup>116</sup>

The three-judge panel reasoned that due to economic circumstances, minorities and the poor have fewer options in treatment and the alleviation of pain.<sup>117</sup> Therefore, they may be more likely to desire suicide.<sup>118</sup> The three-judge panel stated that the patients may choose to reduce the cost of treatment by quickly terminating life to avoid a prolonged illness.<sup>119</sup>

### 4. Protecting people with disabilities from societal indifference and antipathy.<sup>120</sup>

The three-judge panel stated that the public would create and strengthen the stereotype that seriously disabled people should want to die, and that the disabled person would begin to believe this stereotype, thereby creating the desire to commit suicide.<sup>121</sup>

### 5. Preventing physician or patient abuse of the right to die.<sup>122</sup>

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114. *Id.*

115. *Id.*

116. *Compassion in Dying*, 49 F.3d at 592.

117. *Id.*

118. *Id.*

119. *Id.* "[T]he cost of treatment is viewed as relevant to decisions at the bedside." *Id.* (quoting NEW YORK STATE TASK FORCE, *supra* note 111, at 129). The three-judge panel reasoned that reducing the treatment of *treatable* illnesses in the poor would make them the "prime candidates for . . . physician-recommended suicide." *Id.* (emphasis added). The three-judge panel did not acknowledge that the issue in this case regards only patients who are not treatable and who have chosen, through their *own* decision, not their physician's recommendation, to hasten their inevitable deaths. *See id.*

120. *Id.* at 592-93.

121. *Compassion in Dying*, 49 F.3d at 592-93. However, the three-judge panel did not acknowledge that this case only regards terminally ill patients and not those with disabilities. *See id.*

122. *Id.* at 593. In explaining this interest, the three-judge panel only cited

The state interests identified by the *en banc* court in part overlapped with those previously cited by the Washington Supreme Court,<sup>123</sup> and included: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and in precluding the uses of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding adverse consequences.<sup>124</sup> Weighing these interests against an individual's liberty interest, the *en banc* court identified relevant factors necessary to consider in balancing.<sup>125</sup> After carefully considering each state interest in light of these factors, and conceding the importance of many of the state interests, the *en banc* court nonetheless found that the state interests simply do not outweigh the strong liberty interest at stake.<sup>126</sup>

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minimal statistics available from the Netherlands where physician-assisted death for terminally ill, mentally competent patients is not criminalized. *See id.* The three-judge panel announced that, in 1990, 1.8 percent of all deaths in the Netherlands resulted from patient-requested death and that an additional 0.8 percent of all deaths resulted without a contemporaneous request to end the patient's life. *Id.* (citing NEW YORK STATE TASK FORCE, *supra* note 111, at 133-34). However, these are the only statistics cited by the three-judge panel in support of the interest against abuse. *See id.* at 593. It did not discuss whether these statistics are significant nor whether they even reflect an abuse of one's right to choose to die. *See id.*

A study of the Netherlands' physician-assisted death practices shows that in half the cases where the assisted death did not comply with the Netherlands' criteria for consent, the patient had previously expressed a wish to die, but became incompetent before being able to give a valid request. QUILL, *supra* note 14, at 149. In addition, many of the unconsented deaths resulted from the "double effect" of administering pain medication, which happened to result in death. *Id.* Overall, there is not enough data to accurately judge whether these statistics represent abuse at all; however, the study suggests that abuse of physician-assisted death occurred less frequently than speculated and the vast majority of patients died within accepted guidelines. *Id.* at 150.

123. *In re Guardianship of Grant*, 747 P.2d 445, 451 (Wash. 1987); *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983). *See infra* text at note 173 for a list of the articulated interests, and text and accompanying notes 178-197 for a discussion of these interests.

124. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*21-33 (9th Cir. Mar. 6, 1996).

125. *Id.* at \*21. These factors include: (1) the importance of the various state interests, both in general and in the factual context of the case; (2) the manner in which those interests are furthered by the state law or regulation; (3) the importance of the liberty interest, both in itself and in the context in which it is being exercised; (4) the extent to which that interest is burdened by the challenged state action; and (5) the consequences of upholding or overturning the statute or regulation. *Id.*

126. *Id.* at \*21-33.

In addition, the *en banc* court identified safeguards that could be taken to minimize the risks advanced by the state.<sup>127</sup>

The three-judge panel criticized the scope of the district court judgment as being indefinite.<sup>128</sup> It first stated that if the right to die is a liberty interest under the Due Process Clause of the Fourteenth Amendment, it must be applicable to all “sane” adults, not just those who are terminally ill.<sup>129</sup> Therefore, since this right would apply to everyone, the three-judge panel found that it is “illusory” and absurd.<sup>130</sup>

The three-judge panel recognized that too much uncertainty existed as to whom the district court’s judgment applied.<sup>131</sup> It found that, since all three patient-plaintiffs were deceased by the time of the appeal, the district court’s judgment was moot as it relates to the original patient-plaintiffs.<sup>132</sup> The *en banc* court rejected this determination, stating that “since the District Court properly granted the physicians standing to assert the rights of their terminally ill patients in general, it is clear that this case was not rendered moot by the death of the three named patients.”<sup>133</sup> The three-judge panel found that

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127. *Id.* at \*34. These proposed safeguards include, but are not limited to: (1) witnesses to ensure voluntariness; (2) reasonable, though short, waiting periods to prevent rash decisions; (3) second medical opinions to confirm the patient’s terminal status and to confirm that the patient has been receiving proper medical treatment, including adequate comfort care; (4) psychological examinations to ensure that the patient is not suffering from momentary or treatable depression; and (5) reporting procedures that will aid in the avoidance of abuse. *Id.*

[W]e believe that sufficient protections can and will be developed by the various states, with the assistance of the medical profession and health care industry, to ensure that the possibility of error will be remote. We do not expect that, in this nation, the development of appropriate statutes and regulations will be taken lightly by any of the interested parties, or that those charged with their enforcement will fail to perform their duties properly.

*Id.*

128. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 593 (9th Cir. 1995).

129. *Id.* at 591. See *supra* text accompanying notes 84-94 for discussion.

130. *Compassion in Dying*, 49 F.3d at 590-91. See *supra* text accompanying notes 84-94 for discussion.

131. *Compassion in Dying*, 49 F.3d at 593.

132. *Id.*

133. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*3 (9th Cir. Mar. 6, 1996) (citing *Compassion in Dying v. State of*



the district court did not define "terminally ill".<sup>134</sup> The three-judge panel refused to assume that the definition used in another Washington statute could be applied here.<sup>135</sup> Therefore, since the district court did not attempt to specify to whom this right would apply, the district court created an "amorphous class of beneficiaries . . . in this non-class action."<sup>136</sup> The *en banc* court recognized the difficulties in defining "terminally ill," but found that the term "is neither indefinable nor undefined."<sup>137</sup> Therefore, the *en banc* court held that definitional difficulties are not reason enough to deny that a liberty interest in hastening one's own death exists.<sup>138</sup>

## B. EQUAL PROTECTION

The three-judge panel continued its analysis by distinguishing patients simply refusing life support from those seeking medical help to actively bring about death.<sup>139</sup> Since the

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Washington, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994)).

134. *Compassion in Dying*, 49 F.3d at 593.

135. *Id.* The definition states:

"Terminal condition" means an incurable and irreversible condition caused by injury, disease, or illness, that, within reasonable medical judgment, will cause death within a reasonable period of time in accordance with accepted medical standards, and where the application of life-sustaining treatment serves only to prolong the process of dying.

WASH. REV. CODE ANN. § 70.122.020(9) (West Supp. 1995).

The three-judge panel stated the difficulties with such an assumption are: (1) that "terminally ill" and "terminal condition" are different terms; (2) that considerable variation exists as to whom the plaintiffs consider to be terminally ill; and (3) that the states disagree in their definitions of "terminally ill." *Compassion in Dying*, 49 F.3d at 593. The three-judge panel then stated that life itself is a terminal condition, whereas a terminal illness varies depending on the kind of illness it is and the time that illness takes to cause death. *Id.*

136. *Id.*

137. *Compassion in Dying*, 1996 WL 94848, at \*32.

138. *Id.* "[I]t is apparent that purported definitional difficulties that have repeatedly been surmounted provide no legitimate reason for refusing to recognize a liberty interest in hastening one's death." *Id.*

139. See *Compassion in Dying*, 49 F.3d at 591, 593-94. The three-judge panel held that in one instance a patient merely requests the ending of unwanted treatment, as opposed to a patient who "seeks the right to have a second person collaborate in [his or her] death." *Id.* at 594.

The three-judge panel cited *Cruzan* to show that a distinction between the two types of death exists, based on the fact that "the majority of States in this country have laws imposing criminal penalties on one who assists another to com-

three-judge panel found that this difference does not involve either a fundamental right or a suspect classification, it applied a rational basis test.<sup>140</sup> The three-judge panel held that the plaintiffs failed to prove that the Washington State statute had no rational basis to be upheld.<sup>141</sup> Because the *en banc* court held that a violation of due process rendered the statute unconstitutional, it found it unnecessary to consider the plaintiffs' equal protection argument and declined to address it.<sup>142</sup>

## V. CRITIQUE

### A. A CONSTITUTIONAL RIGHT TO DIE EXISTS

The United States Supreme Court has extended due process rights in the past when it has found the right to be "deeply rooted in this Nation's history and tradition"<sup>143</sup> or "of the very essence of a scheme of ordered liberty."<sup>144</sup>

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mit suicide." *Id.* at 591 (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990)). However, the three-judge panel did not acknowledge that the very issue in this case is whether those criminal penalties are constitutional in the context at issue. *See id.* In addition, the three-judge panel noted that the common law doctrine of informed consent allows one to have or reject medical treatment as the patient sees fit. *Id.* at 594. The touching of a person by another without informed consent is battery. *Cruzan*, 497 U.S. at 269. The patient has "the right to be let alone." *Compassion in Dying*, 49 F.3d at 594 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). However, the three-judge panel explained that when a patient asks someone else to cause death, the patient is doing more than merely asking to be let alone. *Id.* It reasoned that this is a different kind of action than merely refusing medical treatment. *See id.*

140. *Id.* at 593-94. The three-judge panel held that this distinction must be upheld unless patient-plaintiffs can show "that the legislature's actions were irrational." *Id.* at 593 (quoting *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988)).

141. *Id.* at 594.

142. *Compassion in Dying*, 1996 WL 94848, at \*39. "One constitutional violation is enough to support the judgment that we reach here." *Id.*

143. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is *deeply rooted in this Nation's history and tradition*." *Id.* (emphasis added).

144. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the *very essence of a scheme of ordered liberty*." *Id.* (emphasis added).

## 1. Nation's History and Tradition

To extend due process to the right to die, the three-judge panel of the Ninth Circuit in *Compassion in Dying v. State of Washington* required this proposed right to have foundation in the traditions and history of our nation.<sup>145</sup> Since the three-judge panel concluded that no such foundation exists, it refused to extend due process rights to a terminally ill patient's personal decision to die.<sup>146</sup> However, the *en banc* court engaged in a comprehensive examination of American history and tradition to support its finding of a liberty interest.<sup>147</sup>

Courts have determined that the Constitution is a living, dynamic document, susceptible to interpretation and expansion regarding the right of personal privacy or a guarantee of certain areas or zones of privacy.<sup>148</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court agreed with this view that the Fourteenth Amendment interest must not be defined too specifically.<sup>149</sup>

145. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 591 (9th Cir. 1995). "In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction. . . . [A] federal court should not invent a constitutional right unknown to the past. . . ." *Id.*

146. *See id.*

147. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*11-16 (9th Cir. Mar. 6, 1996). See also *supra* notes 100-01 and accompanying text for further discussion.

148. *Michigan v. Kevorkian*, No. 93-11482, 1993 WL 603212, at \*7 (Mich. Cir. Ct. Dec. 13, 1993).

[An exclusively historical analysis] would place a straightjacket upon the Constitution, and not permit it to be the living, dynamic document that has endured for more than 200 years — a document that has guided our society through changing mores and attitudes; a document that permits protection of fundamental liberty and personal privacy, even when history and tradition would severely intrude in these areas.

*Id.* See generally *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992).

149. *Casey*, 112 S. Ct. at 2805.

It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the *most*

This was not the first time the Court recognized that narrowly restricting a constitutional analysis of liberty interests to a list of enumerated rights would prohibit society's ability to progress and mature.<sup>150</sup> In addition, the framers of the Constitution intended that it be general and dynamic in nature.<sup>151</sup>

Therefore, despite the three-judge panel's concern that "no constitutional right to aid in killing oneself has ever been asserted and upheld,"<sup>152</sup> history and tradition reveal the value of self-determination, including "the right of every individual to

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*specific level, that were protected against governmental interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.*

*Id.* (emphasis added). The Court offered *Loving v. Virginia* as an example of the Court finding a liberty interest protected against state interference, despite the fact that marriage is not mentioned anywhere in the Constitution. *Id.* (citing *Loving*, 388 U.S. at 12). The Court cites other examples of the Supreme Court defining liberty interests where none was defined in the Constitution. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-86 (1977); *Griswold*, 381 U.S. 479, 481-82, 486-88 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring), 500-02 (Harlan, J., concurring in judgment), 502-07 (White, J., concurring in judgment); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923)).

150. See *Casey*, 112 S. Ct at 2805.

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

*Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)) (emphasis added).

151. Frederick, *supra* note 55, at 77. "[A] minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interest of the nation, than to one which has the regulation of every species of personal and private concerns." *Id.* (quoting THE FEDERALIST No. 84 (Alexander Hamilton)) (emphasis added).

152. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 591 (9th Cir. 1995).

the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestioned authority of law.”<sup>153</sup> Therefore, the *en banc* court correctly recognized that this tradition includes choices about death.<sup>154</sup>

## 2. Liberty Interest

In *Compassion in Dying v. State of Washington*, without any legal authority or analysis, the three-judge panel dismissed *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>155</sup> and *Cruzan v. Director, Missouri Dep’t of Health*<sup>156</sup> as precedent to assert the right to die.<sup>157</sup> This action conflicts with the three-judge panel’s particular concern for adhering to legal precedent.<sup>158</sup>

*Casey* defined what issues fall within the Fourteenth Amendment’s liberty interest.<sup>159</sup> The United States Supreme

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153. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

154. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*18 (9th Cir. Mar. 6, 1996).

Certainly, few decisions are more personal, intimate or important than the decision to end one’s life, especially when the reason for doing so is to avoid excessive and protracted pain. Accordingly, we believe the cases from *Pierce* through *Roe* provide strong general support for our conclusion that a liberty interest in controlling the time and manner of one’s death is protected by the Due Process Clause of the Fourteenth Amendment.

*Id.* See also *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 343 (1990) (Stevens, J., dissenting). “Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

155. 112 S. Ct. 2791 (1992).

156. 497 U.S. 261 (1990).

157. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 590-91 (9th Cir. 1995).

158. *Id.* at 591.

159. *Casey*, 112 S. Ct. at 2807. *Casey* held:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices

Court acknowledged that its purpose did not include imposing a particular moral standard upon the people.<sup>160</sup> The same kind of decision employed in the abortion right exists in the right to die.<sup>161</sup> A terminally ill patient's decision between life

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central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.*

The Supreme Court has also held that "[i]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to *marriage*, *Loving v. Virginia*; *procreation*, *Skinner v. Oklahoma ex rel. Williamson*; *contraception*, *Eisenstadt v. Baird*; *family relationships*, *Prince v. Massachusetts*; and *child rearing and education*, *Pierce v. Society of Sisters*; *Meyer v. Nebraska*.'" *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977) (quoting *Roe v. Wade* 410 U.S. 113, 152-53 (1973)) (emphasis added) (citations omitted). Furthermore, an "interest in independence in making certain kinds of important decisions" exists. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (referring to decision-making within the doctor-patient relationship). The Court held that abortion falls into this liberty interest. *Casey*, 112 S. Ct. at 2807.

160. *Id.* at 2806.

Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter.

*Id.*

161. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*19 (9th Cir. Mar. 6, 1996). "Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'" *Id.*

[I]t does not follow that the State is entitled to proscribe [abortion] in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. . . . These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*.

*Casey*, 112 S. Ct. at 2807-08.

and death directly affects his or her life, much the same way a woman's choice to have an abortion will directly affect her life.<sup>162</sup>

The *Cruzan* Court brought the interest in making personal decisions to the context of decisions to die.<sup>163</sup> *Cruzan* held that a right to refuse all medical treatment, including life-saving hydration and nutrition, is constitutionally protected.<sup>164</sup> This right adheres even if the withdrawal of treatment will result in death.<sup>165</sup> Thus, by giving a terminally ill, mentally competent patient the right to remove treatment, the United States Supreme Court created a constitutional right to die.<sup>166</sup> Encompassed within this right to die is the right to assistance to die.<sup>167</sup> Fortunately, the *en banc* court recognized

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162. Brief of Appellees at 12, n.9, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (No. 94-35534) (1995). Patient-plaintiffs point out that none of the conflicting interests in the abortion decision exist in the terminally ill patient's decision:

The counterpart to "the woman who must live with her decision" is the terminally ill patient, who will not survive the act in question. The "persons who perform and assist the procedure" will only do so if they support the patient's decision. The interests of "spouse, family and society which must confront the knowledge that . . . procedures that some deem an act of violence against an innocent life [exist]" are not implicated since there is no "innocent life". Indeed, interests of spouse, family and society will be *advanced* by recognizing the patient's rights, thereby easing the burden on families who now watch helplessly as loved ones beg futilely for assistance in easing a tortured death. The interest of the separate "life that is aborted" has no counterpart in the decision of a dying person to hasten his or her own death.

*Id.*

163. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). "The choice between life and death is a deeply personal decision of obvious and overwhelming finality." *Id.* at 281. By reviewing the standard of proof for deciding if the patient made this choice, the Court demonstrated that its interest was in ensuring a voluntary decision, not in interfering with this decision. *See id.* at 282-85.

164. *Id.* at 279.

165. *See id.*

166. *Id.* *See Helms, supra* note 78, at 174-76.

167. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*8 (9th Cir. Mar. 6, 1996). The *en banc* court cited *Roe v. Wade* to demonstrate that the Supreme Court first determined that a liberty interest in a certain medical procedure (abortion) existed. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)). It then proceeded to hold that assistance in obtaining that medical proce-

the value of abortion and right-to-die precedents as they relate to this case.<sup>168</sup>

In *Compassion in Dying*, the three-judge panel failed to recognize that the zone of privacy within the Fourteenth Amendment's liberty interest includes a right to make decisions within the context of a doctor-patient relationship.<sup>169</sup> A patient's confidence in this doctor-patient relationship is essential when that patient makes end-of-life decisions.<sup>170</sup> Since a terminally ill patient's decision to die through treatment or lack of treatment is typically within the doctor-patient rela-

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ture must necessarily exist. *Id.* (citing *Roe*, 410 U.S. 113). Like the Washington statute at issue, the statute in *Roe* only prohibited assisting in the procedure, but did not prohibit performing that procedure on oneself. *Id.* (citing *Roe*, 410 U.S. at 151-52). See also Brief of Appellees at 14, n.12, *Compassion in Dying*, (No. 94-35534); *supra* note 99 for further discussion.

168. See *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996).

169. See *Whalen v. Roe*, 429 U.S. 589 (1977). *Whalen* did not disturb the lower court's holding that the "doctor-patient relationship is one of the zones of privacy accorded to constitutional protection." *Roe v. Ingraham*, 403 F. Supp. 931, 936 (S.D.N.Y. 1975), *rev'd* on other grounds *sub nom.* *Whalen v. Roe*, 429 U.S. 589 (1977). Supporting the interpretation that the Court's omission could be construed to include the doctor-patient relationship in the privacy interest is *Paris Adult Theatre I v. Slaton*, 413, U.S. 49, 66, n.13 (1973): "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital . . . or as otherwise required to safeguard the right to intimacy involved." See also Todd David Robichaud, *Toward a More Perfect Union: A Federal Cause of Action for Physician Aid-in-Dying*, 27 U. MICH J.L. REF. 521, 532-33 (1994).

170. See *QUILL*, *supra* note 14, at 44-52. Dr. Quill discusses the important values involved when a physician consults with his or her patient about treatment decisions. *Id.* These values include informed, shared decision-making between patient and doctor; person-centered care and respect for the patient's decisions; acknowledging the powers and limitations of medical care; the problems with prolonging life at the expense of the patient's desire to reduce suffering; and a patient's dignified death. *Id.*

[The physician's role is] to inform and learn from each person; to help them make the best choices, given their values and the nature of their illnesses; to ensure that they did not feel unnecessarily isolated and to try to give them as much control and latitude as possible. Caring humanely for the dying and trying to help them find a dignified death is a fundamentally vital role for physicians.

*Id.* at 52.



tionship, this decision invokes the privacy interest of that relationship.<sup>171</sup>

## B. STATE INTERESTS

Once a liberty interest under the Due Process Clause is found, the individual's constitutional rights must be balanced against relevant state interests to determine whether those rights were violated.<sup>172</sup> The Washington Supreme Court had listed its interests against allowing physician-assisted death as: the preservation of life; the protection of interests of innocent third parties; the prevention of suicide; and the maintenance of the ethical integrity of the medical profession.<sup>173</sup> However, in *Compassion in Dying*, the three-judge panel erroneously listed Washington's interests based upon two task force reports issued in different states, neither of which were available to the district court during the original proceedings.<sup>174</sup> In addition, some of these listed interests do not relate to the issue presented in this case; specifically, whether the right to die applies to *terminally ill, mentally competent adults, who, uncoerced, choose to hasten death*.<sup>175</sup> The *en*

171. *Id.* at 45-46.

172. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)); *Compassion in Dying*, 1996 WL 94848, at \*5.

173. *In re Guardianship of Grant*, 747 P.2d 445, 451 (Wash. 1987) (citing *In re Colyer*, 660 P.2d 738 (Wash. 1983)).

174. See *Compassion in Dying v. State of Washington*, 49 F.3d 586, 592 (9th Cir. 1995). New York and Michigan issued the task force reports. *Id.* See *supra* note 111 for a discussion of these task force reports. See *supra* notes 112-122 and accompanying text for a discussion of the interests.

175. See *Compassion in Dying*, 49 F.3d at 592-93. For example, the three-judge panel stated there is an "interest in protecting all of the handicapped from societal indifference and antipathy." *Id.* This interest may be important, but it is irrelevant in the context at issue which includes only terminally ill patients, not otherwise disabled people. In addition, the three-judge panel is concerned that elderly or infirm people will be subjected to psychological pressure to consent to their death and that minorities and the poor will be exploited. *Id.* at 592. Although these are important concerns, they are misplaced here because this case concerns a *voluntary, uncoerced* decision to hasten death, without psychological or economic pressure or exploitation. These valid concerns might fall into the interest against abuse also cited, but unexplained, by the three-judge panel. See *id.* at 592-93.

Despite the three-judge panel's concern for possible abuse, legalizing physician-assisted death and providing for strict guidelines might actually *reduce* any abuse already in existence. See QUILL, *supra* note 14, at 167.

*banc* court did not commit this same error, but instead listed state interests which overlap and even expand those articulated by the Washington Supreme Court.<sup>176</sup> The following dis-

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There may be more risk for abuse and idiosyncratic decision-making with such secret practices than with a more open, carefully defined practice. . . . [T]here is more risk for vulnerable patients and for the integrity of the profession in such hidden practices, however well intended, than there would be in a more open process restricted to competent patients who met carefully defined criteria.

*Id.* at 166-67. Various surveys show that between 3% and 37% of responding physicians have secretly hastened a patient's death. *Id.* at 159. However, since no legal or professional guidelines were in effect, every one of these doctors may have committed an "abuse" by not following any proscribed safeguards. *See id.* at 167.

For instance, Dr. Jack Kevorkian administered an "abuse" when he allegedly helped a breast cancer patient to die. *Body in Auto is Reported to be Kevorkian's 26th Assisted Suicide*, N.Y. TIMES, November 9, 1995, at A14. However, after the patient's autopsy, the medical examiner disputed the presence of any cancer in the patient. *After Her Suicide, a Clash Over How Ill a Kevorkian Patient Was*, N.Y. TIMES, November 10, 1995, at A13. If guidelines existed, which would include requiring other physicians' diagnoses that the patient is, indeed, terminally ill, abuses such as these would be greatly reduced. *See* QUILL, *supra* note 14, at 166-67.

Dr. Quill presents the following potential guidelines: (1) The patient must repeatedly request to die. The physician must understand the consequences to the patient if the patient is forced to continue suffering. This will help the doctor to establish the rationality of the patient's choice. *Id.* at 161. (2) The patient must make his or her decision with the understanding of its implications and consequences. The physician must make sure this decision is not due to depression. The patient should also undergo a psychiatric evaluation. *Id.* at 161-62. (3) The patient must be incurably and terminally ill with a condition that causes severe, unrelenting, intolerable suffering and pain. The patient's decision should be based on avoiding any more of this suffering. *Id.* at 162. (4) The patient's decision must not be based on inadequate comfort care. That is, all reasonable methods of comfort care must be considered and exhausted before considering hastening death. *Id.* (5) Hastening death should only be done in the context of a meaningful doctor-patient relationship. Unlike Dr. Kevorkian's methods, the doctor and the patient should have had a relationship not based solely on the request to hasten death. At the very least, the doctor should try to know the patient and make sure the patient has made a decision that is right for him or her. *Id.* at 162-63. (6) The physician should consult another doctor to ensure that the patient's decision is voluntary and uncoerced, that it is not based on depression or other factors, and that the patient's diagnosis and prognosis is accurate. *Id.* at 163. (7) Precise documentation should exist to ensure the prior conditions have been met. This would include requiring the patient, the primary physician, and the consulting physician or physicians to sign a consent form. *Id.* at 163-64. (8) No physician should be required to participate in the patient's decision if that physician's personal feelings and beliefs are contrary to hastening death. *Id.* at 163.

176. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*21 (9th Cir. Mar. 6, 1996). *See id.* at \*21-33 for the *en banc* court's thorough discussion of the state interests it identified, which are: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and in

cussion focuses specifically on the state interests previously set forth by the Washington Supreme Court.<sup>177</sup>

### 1. Preservation of Life

The Washington Supreme Court has held that interest in preserving life "weakens considerably . . . if treatment will merely postpone death for a person with a terminal and incurable condition. . . . [T]he terminally ill individual's right . . . must prevail."<sup>178</sup> In addition, the United States Supreme Court recognized that the interest in preserving life is not absolute when it guaranteed the right to withdraw medical treatment, even for those who will die.<sup>179</sup> The Supreme Court also acknowledged that it could not substitute its own moral judgment about the meaning of life in place of an individual's judgment.<sup>180</sup> Washington State also acknowledged that its interest in the preservation of life is not absolute.<sup>181</sup>

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precluding the uses of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding adverse consequences. *Id.*

177. *In re Guardianship of Grant*, 747 P.2d 445, 451 (Wash. 1987) (citing *In re Colyer*, 660 P.2d 738 (Wash. 1983)).

178. *Id.* Other jurisdictions have also held this interest weakens as the patient approaches death. *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 425-26 (Mass. 1977).

179. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). *See also* Frederick, *supra* note 55, at 88-89.

180. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2806 (1992). "[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Cruzan*, 497 U.S. at 313 (Brennan, J., dissenting) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990)) (ellipsis in original).

181. *See generally* WASH. REV. CODE ANN. § 70.122.010 *et seq.* (West & Supp. 1995). By allowing a terminally ill patient on life support to decide to have that support withdrawn, Washington recognizes that not all lives require preservation at all costs. *See generally id.* Although Washington has a legitimate interest in preventing suicide and preserving life, it has carved out an exception for terminally ill patients by allowing for this withdrawal without any sanctions against the patient's physicians. WASH. REV. CODE ANN. §§ 70.122.030(1), 70.122.051 (West Supp. 1995).

## 2. Protection of Third Party Interests

The interest in protecting third parties stems from the state's interest to intervene to protect innocent lives, particularly a patient's minor children.<sup>182</sup> However, New York's highest court held that "the patient's right to decide the course of his or her own medical treatment [is] not conditioned on the patient being without minor children. . . . [A state cannot prohibit parents from] engaging in dangerous activities because there is a risk that their children will be left orphans."<sup>183</sup> Additionally, allowing the patient to choose to die will actually serve the third party's interest because terminating the patient's pain and suffering will also relieve the incredible amount of stress and emotional distress experienced by the third party.<sup>184</sup> In any case, this decision is usually made as a family, accounting for the interests of each family member.<sup>185</sup>

## 3. Prevention of Suicide

Suicide is often defined as an irrational choice to die generally resulting from mental illness or severe depression.<sup>186</sup> However, the majority of terminally ill people who choose to hasten death do not make this decision based on mental illness or depression.<sup>187</sup> The Washington Legislature could introduce safeguards to prevent terminally ill persons from hastening death based on depression.<sup>188</sup> Therefore, rational "suicide," such as the type presented in *Compassion in Dying*, should not

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182. Robichaud, *supra* note 169, at 537.

183. *Id.* (quoting *Fosmire v. Nicoleau*, 551 N.E.2d 77, 83-84 (N.Y. 1990)).

184. Scott I. Davidson, *But, Why Do We Shoot Horses?: An Analysis of the Right to Die and Euthanasia*, 12 N.Y.L. SCH. J. HUM. RTS. 115, 128 (1994).

185. *Id.*

186. See HUMPHRY, *supra* note 14, at 12-13; QUILL, *supra* note 14, at 115.

187. Brief of Appellees at 15, n.13, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (94-35534) (1995). "[I]t is a myth that major clinical depression ordinarily accompanies terminal illness." *Id.* (quoting NEW YORK STATE TASK FORCE, *supra* note 111, at 16, 21). Furthermore, the report acknowledges that depression in the terminally ill can be diagnosed. *Id.* (quoting NEW YORK STATE TASK FORCE, *supra* note 111, at 13, 26).

188. *Id.* at 16.

be criminalized based on the same policies as irrational suicide.<sup>189</sup>

In addition, Washington's interest in preventing suicide is not absolute because no Washington statute prohibits the act of suicide.<sup>190</sup> Preventing suicide in the context at issue really means prolonging the dying process for terminally ill patients.<sup>191</sup> Washington has already recognized the need for an exception to its interest against suicide in cases of terminally ill patients by allowing these patients to make the decision to withdraw life sustaining treatment, even if this withdrawal will result in death.<sup>192</sup> However, inexplicably, Washington allows this exception for only some of its terminally ill patients, rather than all.<sup>193</sup>

#### 4. Interest in the Ethical Integrity of the Medical Profession

The three-judge panel based its concern about the ethical integrity of the medical profession on the concept that a doctor dominates over his or her patients, thereby having the ability to inflict undue influence to obtain a consent to death.<sup>194</sup> However, when dealing with dying patients, a physician's role is to care humanely for those patients and to help them find a dignified death.<sup>195</sup> If the patient and the doctor agree that all

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189. See Frederick, *supra* note 55, at 93-94.

190. *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1464, n.9 (W.D. Wash. 1994). See generally WASH. REV. CODE ANN. § 9A.36.060 (West 1988). This statute amended the previous Washington statute which prohibited attempted suicide, by removing that prohibition. *Compassion in Dying*, 850 F. Supp. at 1464, n.9. The Washington Legislature determined that the person who attempted suicide should not be punished if the attempt was unsuccessful. *Id.* Therefore, if a physician helps another to commit suicide, only the physician is legally responsible, not the person who chose to die. *Id.*

191. *Compassion in Dying*, 850 F. Supp. at 1464.

192. WASH. REV. CODE ANN. § 70.122.030(1) (West Supp. 1995) (permitting withdrawal of medical treatment, even if the withdrawal is sure to result in death).

193. See *id.*; WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

194. See *Compassion in Dying v. State of Washington*, 49 F.3d 586, 592 (9th Cir. 1995).

195. QUILL, *supra* note 14, at 52. More specifically, a physician should inform and learn from each patient; help the patient make the best decision; prevent the feeling of isolation in the patient; and give the patient as much control and latitude as possible. *Id.*

comfort care methods are exhausted and hastened death is the only answer, the doctor would be forced either to ignore the patient's request due to legal constraints, or to act in secret without the benefits of consultation, support from colleagues, and compliance with other possible safeguards.<sup>196</sup> One noted physician concluded that this secret practice will actually harm medical integrity because this "covert practice discourages open and honest communication between physicians, their colleagues, and their dying patients."<sup>197</sup>

### C. EQUAL PROTECTION

Washington State allows one to hasten death passively by withdrawing treatment or nutrition and hydration, but does not allow one to actively take steps to hasten death.<sup>198</sup> As no distinction between active or assisted death and passive death exists, Washington violated the equal protection rights of those who request to hasten death but are "unfortunate" to not require life-sustaining treatment to remain alive.<sup>199</sup>

Both passive and active death require another person to help effectuate death.<sup>200</sup> Active steps must be taken by the physician to ensure the death of the patient.<sup>201</sup> In either instance, death would not occur but for the physician's active participation.<sup>202</sup> As *Cruzan* held that a patient has the right

196. *Id.* at 166.

197. *Id.*

198. WASH. REV. CODE ANN. § 70.122.030(1) (West Supp. 1995); WASH. REV. CODE ANN. § 9A.36.060 (West 1988); *In re Guardianship of Grant*, 747 P.2d 445, 454 (Wash. 1987).

199. *See* *Compassion in Dying v. State of Washington*, 49 F.3d 586, 597 (9th Cir. 1995).

200. Helms, *supra* note 78, at 176. "By withdrawing nutrition and hydration from a patient . . . the physician sets in course an action that will inevitably and directly cause the death of the patient. . . . [D]eath is [now] certain and has been purposely induced. . . . If action is being purposely taken that will bring about certain death, merely waiting for the effect of that action will seem inhumane." *Id.* at 176-77, n.23 (quoting Victor G. Rosenblum & Clarke D. Forsythe, *The Right to Assisted Suicide: Protection of Autonomy or an Open Door to Social Killing?*, 8 ISSUES L. & MED. 3, 24-25 (1990)).

201. *Id.* at 177.

202. *Id.* "Turning off the respirator is viewed by some physicians as an act which directly involves the doctor in ending the patient's life. . . . [T]urning off the respirator is euthanasia in the sense of direct[ly] causing death." *Id.* at 177,

to request the physician to actively remove all life-sustaining treatment, the doctor is not liable or culpable when he or she removes that treatment.<sup>203</sup> As a result, the doctor's legal culpability, or lack thereof, is the same in either case.<sup>204</sup> In both instances, the doctor acts to end the patient's suffering according to that patient's rational decision.<sup>205</sup> Further, in his *Cruzan* concurrence, Justice Scalia stated that there is no legal distinction between actively or passively causing one's own death.<sup>206</sup>

Therefore, as no legal distinction between active and passive death exists, Washington's disparate treatment of terminally ill patients must be narrowly tailored to serve a compelling state interest.<sup>207</sup> Washington's interests are not compelling enough to outweigh terminally ill patients' equal protection rights.<sup>208</sup> Therefore, the three-judge panel erroneously found the Washington statute constitutional.<sup>209</sup> The *en banc* court should have considered and upheld the district court's decision that the statute violated equal protection, in order to resolve this area in the law and set precedent for the future.<sup>210</sup>

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n.28 (quoting DIANE CRANE, *THE SANCTITY OF SOCIAL LIFE: PHYSICIAN'S TREATMENT OF CRITICALLY ILL PATIENTS* 74 (1975)).

203. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

204. Helms, *supra* note 78, at 178.

205. *Id.*

206. *Cruzan* 497 U.S. at 296-97. Scalia's concurrence in *Cruzan* states:

Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to put an end to his own existence. [T]he common law [also] rejected the action-inaction distinction in other contexts involving the taking of human life.

*Id.*

207. *Compassion in Dying v. State of Washington*, 49 F.3d 586, 597 (9th Cir. 1995) (Wright, J., dissenting) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).

208. See *supra* notes 172-197 and accompanying text for discussion.

209. See *Compassion in Dying*, 49 F.3d 586, 594-97; *Petition for Rehearing/Suggestion for Rehearing En Banc*, *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir.) (No. 94-35534) (1995).

210. The *en banc* court declined to consider the plaintiffs' equal protection claim, holding that its analysis of the due process liberty interest was sufficient to declare the Washington statute unconstitutional as it applied to terminally ill, mentally competent adults, who request physician-prescribed medication to hasten

## VI. CONCLUSION

In *Compassion in Dying v. State of Washington*, the three-judge panel of the Ninth Circuit held that a terminally ill, mentally competent adult has no right to a doctor's assistance in terminating his or her life.<sup>211</sup> That is, the three-judge panel held that a due process liberty interest in actively causing one's own death, and assistance to do so, does not exist.<sup>212</sup> Neither does an equal protection right exist, as compared to those similarly situated patients who may remove life-saving treatment or nutrition and hydration, resulting in death.<sup>213</sup>

However, in a comprehensive opinion, the Ninth Circuit *en banc* court reversed the three-judge panel's opinion.<sup>214</sup> Analogizing *Compassion in Dying* to previous cases regarding abortion and the right-to-die, the *en banc* court held that "a constitutionally-protected liberty interest in determining the time and manner of one's own death" exists.<sup>215</sup> The *en banc* court weighed this liberty interest against six state interests identified by the court.<sup>216</sup> These interests include a general state interest in preserving life, and a more specific state interest in preventing suicide.<sup>217</sup> Additionally, the court identified the state's other interests as avoiding the involvement of third parties and precluding the use of arbitrary, unfair, or undue influence; protecting family members and loved ones; protecting the integrity of the medical profession; and avoiding adverse consequences if the statute at issue is declared unconstitutional.<sup>218</sup> After balancing these interests, the *en banc* court held that the statutory language, "or aids another person to attempt suicide," violates the Due Process Clause of the Four-

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their deaths. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848, at \*39 (9th Cir. Mar. 6, 1996).

211. *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995), *rev'd* 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd* No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996).

212. *Id.*

213. *Id.*

214. *Compassion in Dying v. State of Washington*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996), *rev'd* 49 F.3d 586 (9th Cir. 1995).

215. *Id.* at \*1, 6-21.

216. *Id.* at \*21.

217. *Id.* at \*1, 21-26.

218. *Id.* at \*1, 26-33.



teenth Amendment, since it prohibits physicians from prescribing life-ending medication to terminally ill, mentally competent adults who choose to hasten their own deaths.<sup>219</sup>

The *en banc* intentionally did not address the equal protection argument.<sup>220</sup> The *en banc* court stated that since it already held that the statute is unconstitutional as applied, it did not need to address whether a second constitutional violation existed.<sup>221</sup>

Right-to-die issues have received much publicity in the recent past, and have been the subject of considerable litigation across the nation. To quell the litigation and establish a clear constitutional interpretation, the United States Supreme Court surely will need to address this sensitive and controversial issue.

*Cara Elkin\**

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219. *Compassion in Dying*, 1996 WL 94848, at \*1, 37-38. The statute at issue in this case states:

Promoting a suicide attempt. (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide is a Class C felony.

WASH. REV. CODE ANN. § 9A.36.060 (West 1988).

220. *Compassion in Dying*, 1996 WL 94848, at \*39.

221. *Id.*

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